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No. 83-1691

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, *et al.*,
Petitioners,

v.

RONALD E. PAYNE, *et al.*,

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

The Respondents disagree with the question stated by the Petitioner, as equitable estoppel was specifically rejected as the basis for the decision below. Consideration of the applicability of the doctrine, if any, to government agencies is unnecessary to determine:

WHETHER A COURT MAY REMEDY A "GROSS FAILURE ON THE PART OF AN ENTIRE AGENCY" TO COMPLY WITH REGULATIONS REQUIRING SPECIFIC NOTICE OF BENEFITS TO CONGRESSIONALLY INTENDED BENEFICIARIES BY COMPELLING NOTICE UNLAWFULLY WITHHELD AND AFFORDING AN OPPORTUNITY, FOLLOWING NOTICE, FOR THOSE OBJECTIVELY ELIGIBLE TO APPLY.

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v.

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RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Respondents oppose the Petition for a Writ of Certiorari filed by the Solicitor General on behalf of the Secretary of Agriculture and other officials of the Farmers Home Administration (FmHA).

STATUTES AND REGULATIONS INVOLVED

The Petitioner omitted reference to 7 C.F.R. Sec. 1832(3)(a)(1)(1973), which is set forth in full in the Circuit Court Opinion, Petitioners' Appendix p. 4a.

STATEMENT

A. The Disaster of 1973

In April, 1973, heavy rains and flooding occurred in a thirteen county area of northwest Florida.[1] Officials of the Farmers Home Administration, Department of Agriculture (hereinafter "FmHA") reported[2] that, as a result of the "worst flood in twenty-five years",[3] several hundred thousand acres were flooded, with crop losses estimated between twenty-five and ninety percent. The FmHA projected agricultural losses in excess of $3,861,000.00.[4] The President declared

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1 References to "App.___" are to the Appendix filed by the Petitioner. App.1a.

2 This evaluation and reporting is required by 7 C.F.R. 1832.3(b)(1).

3 Plaintiffs' Exhibit 7.

4 Plaintiffs' Exhibits 2, 3, 4, and 5.

the area a major disaster area on May 26, 1973.[5]

B. The Initial Emergency Loan Program.

Pursuant to Section 321(b) of the Consolidated Farm and Rural Development Act,[6] the FmHA was required to make emergency loans available in areas designated as disaster areas. At the time of this Declaration, the FmHA established a nine month application period for emergency loans related to crop loss, and a sixty day application period for emergency loans relating to property damage.[7] Interest on emergency loans at this time was five

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[5] Plaintiffs' Exhibit 8A, App. 2a.

[6] 7 U. S. Code Annot. §1961(b)(1973).

[7] Plaintiffs' Exhibit 8, App. 2a.

(5%) percent per annum.[8]

The FmHA's published regulations during this initial loan application period [7 C.F.R. 1832(3)] required that FmHA officials provide specific types of notice of the availability of these benefits to eligible farmers.[9] The regulations required that the FmHA State Director:

a) notify the appropriate County Supervisors immediately and instruct them to make EM [emergency] loans available;

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[8] This interest rate was also available on "operating loans" provided by the FmHA on a non-emergency basis. Operating loans, however, had to be repaid in one year, while emergency loans could be amortized up to seven years. 7 C.F.R. 1832.10(a)(1973).

[9] The petition fails to mention this specific notice, affirmatively required by FmHA regulations. The regulation is set out in full in the Circuit Court Opinion at App. 4a.

b) notify the State U.S.D.A. Defense Board Chairman; and

c) make such public announcements as appear appropriate.

The regulations also required that the FmHA County Supervisors:

a) notify the appropriate County U.S.D.A. Defense Board Chairmen;

b) make such public announcements as appear appropriate about the availability of EM loans; and

c) explain to other agricultural lenders in the area the assistance available under the program.[10]

The trial court found that the

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[10] The Petitioners' statement, at Page 7 of their Petition, that the Regulations required FmHA's local offices "to make such public announcements as appear appropriate" only partially describes the notice required by this Regulation. Likewise, the Petitioners' reference to a later requirement that the FmHA "inform the news media...of the

FmHA violated its own mandatory regulations by failing to provide the specific notice required to be afforded to farmers eligible for emergency loans.[11]

The trial court also found that the FmHA's limited efforts to make "such public announcements as appear appropriate" were insufficient as a matter of law.[12] On June 4, 1973, a sample press release was forwarded to FmHA County Supervisors which stated that applications for emergency loans

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provisions of P.L.93-237" ignores the other notice affirmatively required by this regulation. The Circuit Court characterized the FmHA's noncompliance as a "gross failure on the part of an entire agency to follow self imposed regulations prescribing adequate notice to potential applicants." App. 17a.

11 App. 39a-40a, App. 20a-21a.

12 App. 40a.

should be submitted prior to July 30, 1973.[13] The nine month application period for crop losses was not mentioned in the press release.[14]

The State Director made no other "public announcements".[15] The press release was routinely forwarded to the local media,[16] but no effort was made to determine if, in fact, the press release was published.[17]

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[13] Plaintiffs' Exhibit 9, App. 35a-36a.

[14] This omission is significant because those farmers who might suffer crop losses would not be able to determine the extent of those losses until August or later, depending on harvest time. Tr. 425-26.

[15] App. 35a-36a.

[16] App. 36a., Tr. 304, 305, 941, 982 and 1036.

[17] Only one article, Defendants' Exhibit 13, was introduced at the trial as having been published through the Defendants' efforts to "make such public announcements as

In June, 1973, the President's Office of Emergency Preparedness conducted a one week public meeting at Live Oak, Florida. Various agencies, including the FmHA, were invited to attend and explain to the public the types of disaster relief available to effected persons. The FmHA had a table at the Live Oak meeting but for a majority of the time it was manned by a volunteer, not employed by the FmHA, who had no knowledge of FmHA programs generally or this emergency loan program specifically.[18]

Several Plaintiffs, and many other local farmers, attended to learn if relief was available for farmers who had suffered crop losses. They were

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appear appropriate" through the use of press releases or other media contacts. App. 36a.

[18] App. 34a-35a.

told "if you are a farmer, you don't qualify. This isn't for farmers."[19] This was, in fact, not true. FmHA officials were aware of the wide-spread belief by many farmers in this erroneous information.[20] The FmHA took no action to correct this erroneous information.

During the first application period, no applications for emergency loans were received.[21] Many FmHA County Supervisors testified that farmers were "switched" from emergency loans to operating loans during this

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[19] Tr. 589; see also Tr. 267-268, 228, 615. App. 34a-35a.

[20] Tr. 993-995, App. 34a-35a.

[21] Claude Greene, State Director of the FmHA for Florida, testified that he was "flabbergasted" at the lack of response to the emergency loan program. App. 36a.

period.[22]

C. The 1974 modification of the emergency loan program.[23]

On January 2, 1974, the President

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[22] App. 38a. The "substitution" of operating loans for emergency loans by FmHA County Supervisors was detrimental in two respects. First, operating loans had to be repaid in one year, as contrasted to seven. More importantly, had emergency loans been made to qualified farmers, they would have received letter notice of the more advantageous provisions of Public Law 93-237. See 7 C.F.R. 1832.84(d) and (e), Plaintiffs' Exhibit 41.

[23] On July 30, 1973, the FmHA amended its regulations dealing with the notice required for emergency loans, to require that "immediately upon receiving notice about counties under his jurisdiction" the County Supervisor should "notify the governing body of the county..." in addition to notifying County U.S.D.A. Defense Board Chairmen, the other agricultural lenders, and the requirement that the County Supervisor "make such public announcements as appear to be appropriate". App. 21a. The FmHA stipulated that they failed to give this notice. Stipulation filed January 27, 1981.

signed Public Law No. 93-237.[24] By this amendment to the Small Business Act, Congress made more attractive disaster relief available for qualifying farmers who had suffered crop and production losses as a result of disasters occurring between December, 1972, and April, 1973. These changes authorized a maximum interest rate of 1%, as contrasted to the previous 5% interest rate on emergency loans, added a $5,000 "forgiveness" feature, and eliminated the requirement that applicants be "unable to obtain... credit elsewhere" in order to qualify for an emergency loan.[25] Congress also required that the Secretary extend the time for accepting applications for

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[24] 87 Stat. 1023-1025 (1974).

[25] Pub.L.No. 93-237, Section 4, 87 Stat. 1024, (January 2, 1974) App. 56a.

these benefits in order to provide notice to eligible farmers.[26]

FmHA officials failed to notify the State and local FmHA offices of the existence of these benefits or the re-opened application period until more than two-thirds of the period had already passed.[27] On February 27, 1974, the FmHA published an amendment to 7 C.F.R. Section 1832 which implemented the changes contained in Public Law 93-237. The amended regulations required that notice be provided to eligible farmers by state and county FmHA officials by requiring that they "inform the news media

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[26] Pub.L.No. 93-237, Section 10(c), App. 56a.

[27] A local FmHA official testified that his first notice of the new application period came from RONALD PAYNE. Tr. 427. This was confirmed by O.R. Hammerick, County Agent. Tr. 576.

including newspaper, radio and television in the effected counties of the provisions of P.L. 93-237."[28]

FmHA regulations also required that the County FmHA Supervisors prepare a list of borrowers who received EM loans and mail individual letter notices of the new application period to them.[29] Since there were no emergency loan applications filed during the first application period, these letters were provided to the County FmHA Supervisors but sent to no one.[30] On February 28, 1974, the FmHA State Director issued a sample press

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[28] Plaintiffs' Exhibit 41, App. 51a.

[29] Plaintiffs' Exhibit 41, 7 C.F.R. 1832.84(d) and (e). App. 6a-7a.

[30] Tr. 144. App. 7a. No effort was undertaken to send letters to those farmers who, although qualified for emergency loans earlier, had been "switched" to operating loans. App. 37a.

release to all County Supervisors.[31] This press release stated that loan applications would be taken under the terms of a new law, but did not recite the critically important "provisions of P.L. 93-237" concerning the $5,000 "forgiveness", the 1% rate of interest, or the fact that the availability of other credit no longer precluded participation in the program.[32] Once again, the press release was routinely sent to the media, but received little publication.[33] FmHA officials made no

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[31] Plaintiffs' Exhibit 21, Trial Court Opinion, App. 37a.

[32] Id.

[33] Only two newspaper articles were introduced at trial as having been actually published, Defendants' Exhibits 11a and 11b. Neither of these articles contained the critical information concerning "the provisions of Public Law 93-237". 7 C.F.R. 1832.82(a). App. 7a.

other efforts to inform eligible farmers of the existence of, or the favorable terms contained in, Public Law 93-237.[34]

No efforts were made to contact farmers who had inquired about, or may have needed, an emergency loan, nor was there any effort to contact borrowers who had inquired about emergency loans and were "switched" to operating loans at now considerably less advantageous terms and rates.[35]

During both first and second application periods, FmHA County

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[34] Id. Specifically, there was no notification of the county governing body; no notification of other agricultural lenders; and no notification of the U.S.D.A. Defense Board chairman.

[35] App. 37a. Compare the notice provided by the SBA and ASCS, sister agencies of the FmHA, during this disaster program. App. 22a-23a.

Supervisors sent routine mailings to farmers who had existing loans. No notice of the availability of emergency loans was included.[36]

Further, the FmHA was aware that a "sign in sheet" had been maintained at the Live Oak meeting,[37] and was aware of the wide-spread, albeit erroneous, belief that no disaster relief was available for farmers. No effort was made to notify those farmers who had "signed up" at Live Oak.[38]

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[36] Tr. 943-945, Tr. 1040, 1041, Tr. 837, 838. See also Tr. 719-20.

[37] Tr. 1023-1024. App. 23a.

[38] Tr. 1023-24. Only four loans were granted by the FmHA for this disaster. [App.33a]. Three loans were the direct result of RONALD PAYNE'S insistence to effected farmers that emergency relief was, in fact, available. [Tr. 762-65]. Mr. PAYNE attempted to notify other farmers, but they did not believe that assistance was available, "because [they] didn't hear it from other sourves." [Tr. 762-63].

ARGUMENT

I

Equitable estoppel was neither plead nor relied upon by the Plaintiffs in, nor was it considered or applied by, either the trial court or the Circuit Court.[39] The trial court simply compelled, by mandatory injunction, specific notice by the FmHA of benefits to which the Plaintiffs were objectively entitled and allowed an opportunity for the Plaintiffs to apply for these benefits following the notice required by FmHA regulations. This relief was necessary and available under 5 USC §706 to provide "agency

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[39] The Circuit Court specifically declined to base its decision on misrepresentation by the FmHA, holding that the District Court remedy was "mandated by the [FmHA's] failure to follow affirmatively required procedure." App. 18a., citing United States v. Heffner, 420 F.2d 809 (4th Cir. 1970).

action which [had been] unlawfully withheld...."

Unlike Heckler v. Community Health Services, 52 U.S. Law Weekly 4621 (Opinion dated May 21, 1984), the Plaintiffs here will not receive that which they "should never have received in the first place." Id. at 4624. Compare Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed 10 (1947). Nor will the relief afforded threaten the public fisc. Compare Federal Crop Insurance Corp. v. Merrill, supra. Relief is afforded only to farmers objectively qualified to apply for benefits, and who did not apply because they were not notified of the existence of disaster relief and their ability to apply for it.[40]

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[40] App. 41a. The FmHA has never argued that the funds appropriated by

This was not an isolated, oral violation of internal procedures, the consequences of which a negligent Plaintiff could avoid, at least in large part, by complying with valid agency regulations at some subsequent time.[41] Here, there was a "gross failure on the part of an entire agency" to provide notice which only that agency could provide.[42] These Plaintiffs certainly were not negligent in believing repeated assurances by FmHA officials that disaster relief was

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Congress are no longer available for emergency loans. They argue that because no applications were filed, they have no authority to consider applications after the deadline. This interpretation is directly contrary to Congress' intent. See generally App. 14a-15a.

[41] Compare Schweiker v. Hansen, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981)(per curiam).

[42] Compare Heckler, supra.

not available for farmers.[43] These farmers, having been deprived of specific notice required by FmHA regulations, and having been told by the FmHA on numerous occasions that no relief was available, could not correct their failure to apply at all unless notice is compelled and the application period is extended.

The Petitioners argument that the Court "is powerless in the public interest to relax the time provisions of its procedural rules...is not worthy of serious consideration."[44] Health Systems Agency of Oklahoma, Inc. v.

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43 Tr. 206, 207, 228, 267-68, 588, 615, 683-85.

44 NLRB v. Monsanto Chemical Co., 205 F.2d 763, 764 (8th Cir. 1953). See also American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 90 S.Ct. 1288, 25 L.Ed.2d 547 (1970).

Norman, 589 F.2d 486 (10th Cir. 1978).

While we do not concede that equitable estoppel would not be appropriate where the court finds a gross failure of an entire agency to provide specific notice required by valid regulations, resulting in objectively eligible beneficiaries complete inability to apply for benefits intended by Congress, the applicability of the doctrine was not the basis for the opinions below and need not be decided by this Court. Heckler, supra. None of this Court's prior decisions dealing with equitable estoppel are inconsistent with the relief afforded here.

II

The FmHA determined, by valid, binding regulations that it had a duty to "inform the public of the privileges and benefits available" through specific types of notice. The Court below simply held that "before the [agency] may extinguish the entitlement of these otherwise eligible beneficiaries, it must comply, at a minimum, with its own...procedures." Morton v. Ruiz, 415 U.S. 199, 235, 39 L.Ed.2d 270, 294, 94 S.Ct. 1055 (1974).[45] This holding is consistent with this Court's repeated holdings that an administrative agency must comply with its own procedures before

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[45] The agency itself determined that "a delay in implementing the provisions of the public law by [its] regulation[s] would be contrary to the public interest." 39 Fed. Reg. 7569 (1974). App. 49a.

significant rights are terminated. Compare United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 98 L.Ed. 681, 74 S.Ct. 499 (1954), (violation of procedural regulations in deportation proceeding); Service v. Dulles, 354 U.S. 363, 1 L.Ed.2d 1403, 77 S.Ct. 1152 (1959) and Vitarelli v. Seaton, 359 U.S. 535, 3 L.Ed.2d 1012, 79 S.Ct. 968 (1959) (violation of procedural regulations in employee dismissal). See also Yellin v. United States, 374 U.S. 109, 10 L.Ed.2d 778, 83 S.Ct. 1828 (1963).

It is clear that agency action which frustrates the congressional policy which underlies a statute is invalid. See Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726, 745-46, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973); NLRB v. Brown, 380

U.S. 278, 291, 85 S.Ct. 980, 13 L.Ed.2d 839 (1965); Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 715 (8th Cir. 1979).

The Circuit Court's review of the Congressional history[46] amply demonstrates that the Congress acted out of "concern that administratively set deadlines...set by the [FmHA]...may expire, thus precluding...farmers... from applying for benefits...."[47] Congress clearly intended "that the benefits of the emergency loan program be extended to all eligible farmers and that they have ample opportunity to

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[46] Conf. Rep. No. 93-363, 93d. Cong., 1st Sess. 2, reprinted in 1973 US Code. Cong. & Add. News 3342, 3343. See generally App. 7a-9a, 13a-16a.

[47] App. 14a.

[48] App. 15a.

derive benefits therefrom."[48]

This clear congressional intent was violated when the agency withheld compliance with regulations "specifically designed to transmit notice of available emergency loan programs to the public."[49] This "gross failure on the part of an entire agency"[50] to comply with its own regulations was "an apparent attempt to comply with executive budgetary goals," contrary to the clear intent of Congress.[51]

Where a federal agency refuses to act in disregard of its legal duty to act, 5 U.S.C. § 706(1) empowers the

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[49] App. 21a. [emphasis by the Court].

[50] App. 17a.

[51] App. 9a. Compare Sioux Valley Empire Electric Association, Inc. v. Butz, 504 F.2d 168 (8th Cir. 1974), Berends v. Butz, 357 F.Supp. 143 (D. Minn. 1973).

federal courts to provide appropriate relief.[52] See e.g. EEOC v. Liberty Loan Corporation, 584 F.2d 853, 856 (8th Cir. 1978). Under both general equitable powers and powers granted under the Administrative Procedures Act, courts can insure that statutory rights are not denied by agency inaction. See e.g. Nader v. FCC, 172 U.S. App. D.C. 1, 520 F.2d 182 (1975); Environmental Defense Fund, Inc. v. Harden, 138 U.S. App. D.C. 391, 428 F.2d 1093 (1970); Deering Millikin, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961); American Broadcasting

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[52] Petitioner, for the first time, argues in its Petition, at p. 18, that this case is not one for judicial review under the 5 USC § 702. The Complaint sought relief under the APA. No issue as to failure to exhaust administrative review was raised by the defendants in, nor was it considered by, either the trial court or the Circuit Court.

Company v. FCC, 191 F.2d 492 (DC Cir. 1951); Caswell v. Califano, 583 F.2d 9, 15-16 (1st Cir. 1978).

CONCLUSION

The trial court properly "compel[led] agency action unlawfully withheld" by mandatory injunction pursuant to 5 U.S.C. §706(1); required the FmHA to provide notice to eligible farmers; and afforded an opportunity to apply for benefits to which they were entitled.[53] Neither the prior holdings of this Court nor the congressional intent of Public Law 93-237 supports what the circuit court characterized as the FmHA's "absurd position...that it can disobey a congressional mandate to make loans available to eligible farmers..."[54] with impunity.

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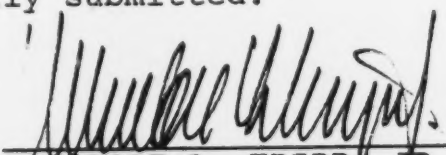
[53] "To hold otherwise would allow [the agency] to totally fail to provide notice to congressionally intended potential beneficiaries and avoid being called to task for such conduct." App. 16a.

[54] App. 11a.

The circuit court opinion is fully consistent with, and required by, prior holdings of this court including Morton v. Ruiz, supra, and United States ex rel. Accardi v. Shaughnessy, supra. The petition for certiorari should be denied.

Respectfully submitted.



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